Supreme Court
FILED
APR 26 2001
CLERK

(2)

No. 00-1382

In the Supreme Court of the United States

FRED D. COOK, JR. AND JANE A. COOK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

BARBARA D. UNDERWOOD
Acting Solicitor General
Counsel of Record

CLAIRE FALLON
Acting Assistant Attorney General

KENNETH L. GREENE
DONALD B. TOBIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

11pt

QUESTION PRESENTED

Whether a payment received by petitioner as part of a downsizing program is excludable from income under Section 104(a)(2) of the Internal Revenue Code, 26 U.S.C. 104(a)(2), as damages received on account of personal injuries or sickness.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	5
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Abbott v. *United States*, 231 F.3d 889 (2d Cir. 2000), cert. denied, No. 00-1065 (Apr. 2, 2001)	5
Abrahamsen v. *United States*, 228 F.3d 1360 (Fed. Cir. 2000), cert. denied, No. 00-1066 (Apr. 2, 2001)	5
Commissioner v. *Schleier*, 515 U.S. 323 (1995)	5
Gajda v. *Commissioner*, 158 F.3d 802 (5th Cir. 1998)	5-6
Lubart v. *Commissioner*, 154 F.3d 539 (5th Cir. 1998)	6
Pipitone v. *United States*, 180 F.3d 859 (7th Cir. 1999)	7
Rogers v. *Lodge*, 458 U.S. 613 (1982)	7
Tiffany Fine Arts, Inc. v. *United States*, 469 U.S. 310 (1985)	7

Statutes:

Internal Revenue Code, 26 U.S.C. 104(a)(2)	4, 5
Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605(a), 110 Stat. 1838	5

In the Supreme Court of the United States

No. 00-1382

FRED D. COOK, JR. AND JANE A. COOK, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 3a-5a), is unpublished, but the decision is noted at 243 F.3d 561 (Table). The opinion of the Court of Federal Claims (Pet. App. 1b-6b) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 2000. The petition for rehearing was denied on November 15, 2000. Pet. App. 2a. The petition for a writ of certiorari was filed on February 7, 2001. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner Jane A. Cook was employed by IBM from 1968 through 1970 and from 1978 through 1993.[1] In 1993, she left her employment with IBM as part of a downsizing program adopted by that company to help its technology products division become more competitive. Pet. App. 3b. Pursuant to this program, IBM paid a lump-sum to each participant based on the employee's years of service and salary at the time of termination. *Id.* at 5a, 3b. Participants were granted a "retirement bridge leave of absence," which allowed them to take leave until they became eligible for retirement. *Id.* at 3b, 2d. IBM withheld income and employment taxes from all payments made under its downsizing program. The company's representative testified that these payments were made to facilitate the downsizing program and not as a settlement of personal injury claims. *Id.* at 5b.

When petitioner participated in the downsizing program in 1993, she took a pre-retirement leave of absence and received a lump-sump payment of $37,790. The amount of this payment was based wholly upon her salary and years of service. Pet. App. 5a, 3b. As a condition of participation in the downsizing program, employees were required to resign or take a bridge leave of absence and to sign a general waiver of any and all claims against IBM. *Id.* at 3b. The release was a standard form. It was not negotiated with, or tailored to the particular circumstances of, any individual participant. *Id.* at 5b. Under the form release, each participant released IBM from all claims arising from the Age

---

[1] Petitioner Fred D. Cook is a party to this action solely because he filed a joint return with Jane Cook. Pet. App. 2b. References to petitioner in this brief are to Jane Cook.

Discrimination in Employment Act of 1967, as amended, Title VII of the Civil Rights Act of 1964, as amended, and any other federal, state or local law dealing with discrimination in employment, and for all "claims based on theories of contract or tort, whether based on common law or otherwise." *Id.* at 2d.

As part of the termination agreement, petitioner stipulated that, if she returned to work at IBM, the company would be entitled to repayment of a prorated portion of the lump-sum termination payment. Pet. App. 4d. The program agreement also specified that IBM would withhold appropriate payroll taxes from this payment. *Id.* at 5d.

2. Several years before petitioner left her employment at IBM, she had reported several work-related injuries. From separate incidents, she reported a back injury, torn ligaments and cartilage damage to her right knee, and sensitivity to oil-based paint fumes that caused nausea and headaches. Pet. App. 2b. Petitioner did not file a worker's compensation claim with respect to any injuries or illnesses she suffered while working at IBM. Instead, IBM paid her salary during her recovery periods at home, took actions to alleviate or minimize the amount of discomfort she experienced while at work, and paid for all of her medical claims and medical insurance premiums. *Ibid.*

Petitioner acknowledged that, as of the time she signed the release, she had not asserted or threatened any claims against IBM for personal injury or for physical or emotional harm. C.A. App. 20-22. She further stipulated that neither her manager at IBM nor any other IBM official ever stated to her that the lump-sum payment she received was in settlement of any type of claim for personal injury against that company. *Id.* at 24.

3. Petitioner filed a timely federal income tax return for 1993 and paid the taxes due. She thereafter filed a claim for refund of the income taxes withheld from her lump-sum payment from IBM. She contended that this payment was received in settlement of claims for personal injuries based upon tort and tort-type rights and was therefore excluded from income under Section 104(a)(2) of the Internal Revenue Code, 26 U.S.C. 104(a)(2). When the Internal Revenue Service denied the refund claim, petitioner commenced this refund action in the Court of Federal Claims.

4. The Court of Federal Claims granted the government's motion for summary judgment. Pet. App. 1b-6b. The court concluded that "IBM did not intend for the lump sum payment to be settlement of a personal injury claim" and that the "payments were made because of corporate downsizing" and "not as settlement of personal injury claims." *Id.* at 5b. The court noted that petitioner had no pending suits or claims against IBM and had not threatened to file any such suits or claims. *Ibid.* The court found that the form release signed by petitioner was a general release signed by all participants and that the lump-sum payment was based solely on length of employment and not upon any tort theory of recovery. *Ibid.* The court pointed out that there was simply no evidence that the payment was made as a settlement of a personal injury claim. *Ibid.* The court observed that petitioner "agrees that IBM did not tell her that the lump sum payment was offered in settlement of a personal injury claim" and that she "did not negotiate the terms of the payment as would be expected in a tort settlement." *Ibid.*

5. The court of appeals affirmed. Pet. App. 3a-5a. The court held that petitioner's lump-sum payment was not received "on account of personal injuries or sick-

ness" and was therefore not excludable from income under Section 104(a)(2) of the Code. *Id.* at 5a. The court noted that the payment was based solely on petitioner's salary and length of service with IBM and was not designed to compensate her for any specific injuries. *Ibid.* The court held that the amount she received was "completely independent of the existence or extent of any personal injury." *Ibid.* (quoting *Commissioner* v. *Schleier*, 515 U.S. 323, 330 (1995)).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. The courts below correctly held that the lump-sum payment that petitioner received from IBM was not excludable from income under Section 104(a)(2) of the Internal Revenue Code as "damages received * * * on account of personal injuries or sickness." 26 U.S.C. 104(a)(2).[2] The same question presented in this case was raised, and resolved adversely to the taxpayer, in other cases involving the IBM downsizing program in which this Court recently denied petitions for a writ of certiorari. *Abbott* v. *United States*, 231 F.3d 889 (2d Cir. 2000), cert. denied, No. 00-1065 (Apr. 2, 2001); *Abrahamsen* v. *United States*, 228 F.3d 1360 (Fed Cir. 2000), cert. denied, No. 00-1066 (Apr. 2, 2001). Accord, *Gajda* v. *Commissioner*, 158 F.3d 802 (5th Cir.

---

[2] In the Small Business Job Protection Act of 1996, Pub. L. No. 104-188, § 1605(a), 110 Stat. 1838, Congress amended Section 104(a)(2) to exclude from gross income only damages paid on account of "physical" injuries and sickness. This amendment does not apply to this case because the releases were signed prior to the effective date of the Act. See 110 Stat. 1838.

1998); *Lubart* v. *Commissioner*, 154 F.3d 539 (5th Cir. 1998). For the same reasons stated in our brief in opposition to the petitions for certiorari that the Court recently denied, the petition for a writ of certiorari should be denied in this case as well.[3]

2. Petitioner stipulated that as of the time she signed the release, she had not asserted or threatened any claims against IBM for personal injury, including any physical or emotional harm. C.A. App. 20-22. She further stipulated that neither her manager nor any other IBM official ever stated to her that the lump-sum payment in issue was made in settlement of a tort-type or any other claim for personal injury against IBM. *Id.* at 24. The release signed by petitioner was a standard form release that did not reflect a negotiated compromise of any actual claims. Everyone who participated in the program received a lump-sum payment calculated in exactly the same way. The amount of the payment was based on salary and length of service, and was not calculated based on the value of any particular claim or injury alleged to have been sustained. The release signed by petitioner was not negotiated by IBM and petitioner in the context of a pending claim or lawsuit, but was instead imposed in the context of a corporate downsizing effort. The release was drafted by IBM and was not tailored to any individual's particular circumstances. In short, the downsizing payments were not made to petitioner on account of any personal injury, and the payment compensated petitioner only for an economic loss, not personal damages.

---

[3] We are providing herewith to petitioner a copy of the government's brief in opposition to the petitions in Nos. 00-1065 and 00-1066.

Petitioner nonetheless claims (Pet. 9-10) that her case is distinguishable from the other IBM downsizing cases because she actually suffered injuries during the years of her employment. But the injuries that she describes (see page 3, *supra*) were irrelevant both to the decision to make, and to the calculation of, the lump-sum payments under the downsizing program. As the courts below correctly concluded, the record of this case amply demonstrates that the payment she received was not made as compensation for any personal injury she may have suffered. Pet. App. 5a, 5b. That factual determination, which was "concurred in by two lower courts" (*Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982)), does not warrant review by this Court. See *Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317-318 n.5 (1985).[4]

---

[4] Petitioner errs in asserting (Pet. 5) that the decision in this case conflicts with *Pipitone* v. *United States*, 180 F.3d 859 (7th Cir. 1999). The decision in *Pipitone* in fact supports the decision in this case. *Pipitone* involved a plaintiff who received a severance payment from his company. The plaintiff argued that the payment was compensation for his release of any claims he might have for age discrimination and other tort claims. *Id.* at 861. The court concluded, however, that the severance payment was not made to compensate the plaintiff for those claims but was instead made to compensate the plaintiff for the termination of his employment. Because the employment termination did not itself cause a personal injury, the court held that the severance payment was not excluded from income under Section 104(a)(2). 180 F.3d at 864.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BARBARA D. UNDERWOOD
Acting Solicitor General

CLAIRE FALLON
Acting Assistant Attorney General

KENNETH L. GREENE
DONALD B. TOBIN
Attorneys

APRIL 2001